

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

|                     |   |                     |
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| In the Matter of    | ) |                     |
|                     | ) |                     |
| Creation of a Low   | ) | MM Docket No. 99-25 |
| Power Radio Service | ) |                     |
|                     | ) |                     |

To: The Commission

**COMMENTS OF  
NATIONAL PUBLIC RADIO, INC.**

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## Summary

When it established the LPFM service, the Commission stated that it was "determined to preserve the integrity and technical excellence of existing FM radio service."<sup>1</sup> The Commission sought to do so by, "[f]irst and foremost, . . . requir[ing] that new LPFM stations protect radio reception within the service areas of existing full-service stations, as well as the existing services of FM translator and booster stations."<sup>2</sup> In the Second Order on Reconsideration and Further Notice of Proposed Rulemaking, the Commission again invokes the objective of "maintaining the integrity of the FM service."<sup>3</sup> However, raising "a number of technical and ownership issues related to LPFM," and in the interest of "improving" the LPFM service, the Second Reconsideration Order/Further Notice suggests rule changes that, if adopted, will undermine present and future FM services for millions of Americans, particularly in rural and other unserved and underserved areas of the country.

The Commission should not make LPFM stations primary to translator stations or summarily dismiss all pending translator stations. The stated reason for considering those measures -- the filing of allegedly fraudulent translator applications during a 2003 filing window -- cannot justify eliminating longstanding translator services or dismissing bona fide applications for new translator service. To the contrary, the Commission possesses ample means to investigate any abuse in the application filing process and, assuming a relative few entities were responsible for filing a large percentage of the applications, as has been alleged, it should not be

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<sup>1</sup> In the Matter of Low Power Radio Service, Report and Order, 15 FCC Rcd. 2205, 2206 (2000) [hereinafter "LPFM Report and Order"].

<sup>2</sup> LPFM Report and Order, 15 FCC Rcd. at 2230.

<sup>3</sup> Second Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket No. 99-25, 20 FCC Rcd. 6763 (rel. Mar. 17, 2005) [hereinafter "Second Reconsideration"].

difficult for the Commission to appropriately, and more narrowly, address the matter

Public radio translator stations perform an important service, typically extending a service to an unserved neighboring community. These services are usually implemented only in response to local requests to receive the service and often with financial support from the Federal and state governments and the local community. Public radio stations often localize their services by ascertaining and addressing issues of particular interest to communities served by their translator stations, and the translators often provide the only public radio signal in the community. We appreciate the importance of origination services, but the Commission only recently arrived at the current balance between the translator and LPFM services, and there is no compelling reason, including the 2003 translator filing window, to revisit the matter.

The Commission should also retain the second and third adjacency protections for subsequently authorized full power stations. In requiring the Commission to maintain interference protection standards in effect prior to the promulgation of the LPFM rules, Congress drew no distinction between then-existing and future full-power stations. Even if the statutory language left room for doubt, the underlying legislative history expressly addressed the issue, explaining that the restored interference protections were also intended to protect new and subsequently modified full power stations. Apart from the law, eliminating the second and third-adjacency protections for future full power stations is contrary to sound spectrum management.

Finally, NPR believes the LPFM service can and should be improved. In considering rule changes to accomplish that objective, however, the Commission should be careful to preserve the essential character of the LPFM service as a highly localized service intended to promote diversity of ownership and opportunities for new broadcast voices. Thus, NPR supports

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Order/Further Notice"].

the proposals to permit transfers or assignments of LPFM licenses, to extend the construction period from 18 months to 3 years, and to facilitate time-share arrangements.<sup>4</sup> Those measures promise only to encourage a stable LPFM service. NPR also supports reinstating the original ownership and eligibility requirements because those requirements are important to maintaining the character of the LPFM service.

As a system of locally licensed, locally owned and governed, locally staffed, and locally programmed stations, public radio understands well the importance of diverse, locally-oriented, and noncommercial radio services. No matter how virtuous new services can be, however, their initiation should not occur at the expense of important existing public radio services.

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<sup>4</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6769-72 & 6774-75.

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To: The Commission

**COMMENTS OF  
NATIONAL PUBLIC RADIO, INC.**

**Introduction**

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, National Public Radio, Inc. ("NPR") hereby submits its Comments in response to the Further Notice of Proposed Rulemaking proposing certain changes to the rules governing the Low Power FM ("LPFM") radio service.<sup>5</sup>

NPR is a non-profit membership corporation that produces and distributes noncommercial educational programming through more than 790 public radio stations nationwide. In addition to broadcasting award winning NPR programming, including *All Things Considered*<sup>®</sup>, *Morning Edition*<sup>®</sup>, *Talk Of The Nation*<sup>®</sup>, and *Performance Today*<sup>®</sup>, NPR's Member stations originate significant amounts of news, informational, and cultural programming. NPR also operates the Public Radio Satellite Interconnection System and

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<sup>5</sup> Second Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket No. 99-25, 20 FCC Rcd. 6763 (rel. Mar. 17, 2005) [hereinafter "Second Reconsideration Order/Further Notice"].

provides representation and other services to its Member stations.

**I. NPR Supports The Commission's Efforts To Improve The LPFM Service While Preserving Its Essential Character As A Highly Localized Service**

Throughout this proceeding, NPR has supported the LPFM service because NPR recognizes the fundamental importance of a diversity of programming services and station ownership.<sup>6</sup> For that reason, NPR supports those proposed changes that would strengthen the LPFM service without fundamentally altering its character or undermining other broadcast services. Specifically, NPR supports the proposals to permit transfers or assignments of LPFM licenses, extend the construction period from 18 months to 3 years, and facilitate time-share arrangements.<sup>7</sup> NPR also supports reinstating the ownership and eligibility requirements because those requirements are important to maintaining the character of the LPFM service.<sup>8</sup>

In creating the LPFM service, the Commission relied on fundamental principles of localism and diversity.<sup>9</sup> Indeed, the Commission stressed that its goal was "to create a class of

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<sup>6</sup> See, e.g., Comments of National Public Radio, MM Docket No. 99-25, at 2 (filed Aug. 2, 1999) ("Given the history and mission of public radio, there should be no question about NPR's support for programmatic and ownership diversity.")

<sup>7</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6769-72 & 6774-75.

<sup>8</sup> As addressed in Section II and III, below, NPR opposes the proposals to subvert the translator service in favor of LPFM stations and to eliminate the second- and third-adjacent channel protection that LPFM stations currently provide to subsequently authorized full power stations.

<sup>9</sup> At the core of broadcasters' public interest obligations are the values of diversity of ownership and localism.

Diversity is one of the guiding principles of the Commission's local radio ownership rule. This principle is intended to advance the values of the First Amendment, which, as the Supreme Court stated, 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'

radio stations designed to serve very localized communities or underrepresented groups within communities."<sup>10</sup> By providing opportunities for new voices to be heard, the Commission hoped the LPFM service would promote diversity as well.<sup>11</sup>

In designing the final LPFM rules, the Commission repeatedly emphasized the highly local nature of the service.<sup>12</sup> Indeed, the Commission did not authorize a class of 1000 watt LPFM stations, as it had originally proposed, because the larger service areas of such stations were viewed as inconsistent with the localized nature of the new service.<sup>13</sup> The Commission also adopted local and multiple ownership rules specifically to preserve opportunities for new entrants and to forestall ownership concentration.<sup>14</sup>

While the Commission's rules provided a staged elimination of the local and multiple

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See In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Notice of Proposed Rulemaking and Further Notice of Proposed Rule Making, MM Docket No. 01-317, MM Docket No. 00-244, 16 FCC Rcd. 19,861, at ¶ 29 (rel. Nov. 9, 2001) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

The Communications Act of 1934 also established localism as a touchstone for the allocation of spectrum for over-the-air broadcast use. 47 U.S.C. § 307(b). See also Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 207 (D.C. Cir. 1956) ("In requiring a fair and equitable distribution of service, Section 307(b) encompasses not only the reception of an adequate signal but also community needs for programs of local interest and importance and for organs of local self-expression."), cert. denied, 350 U.S. 1007.

<sup>10</sup> See LPFM Report and Order, 15 FCC Rcd. at 2208.

<sup>11</sup> See In the Matter of Low Power Radio Service, Memorandum Opinion and Order, 15 FCC Rcd. at 19208, 19208 (2000) [hereinafter "LPFM Memorandum Opinion and Order"].

<sup>12</sup> See, e.g., LPFM Report and Order, 15 FCC Rcd. at 2208 ("Our goal in creating a new LPFM service is to create a class of radio stations designed to serve very localized communities or underrepresented groups within communities.").

<sup>13</sup> LPFM Report and Order, 15 FCC Rcd. at 2208.

<sup>14</sup> LPFM Report and Order, 15 FCC Rcd. at 2222.



ownership restrictions to assure sufficient demand for LPFM stations,<sup>15</sup> actual demand for LPFM stations should dispel any feared lack of interest in the service.<sup>16</sup> Moreover, the absence of a local LPFM station in a given community at a given point in time does not mean that no local entity will ever seek a license. Indeed, local and multiple ownership restrictions may be essential to preserving opportunities for new, local entrants in many communities.

Given the specific purposes underlying the LPFM service, as well as the relatively small geographic areas served by an LPFM station, the absence of significant local and multiple ownership rules threatens to alter the character of the LPFM service. It is instructive to consider commercial broadcasting, where a small number of owners have acquired ever larger numbers of stations following elimination of the national ownership rule and relaxation of the local ownership rules.<sup>17</sup> By further comparison, and while there are no local or multiple ownership regulations governing public radio, there are significant social and institutional forces, such as statutorily mandated open public meetings and community advisory boards, that operate to

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<sup>15</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6773.

<sup>16</sup> See, e.g., Settlement Period Announced for Closed Groups of Pending Low Power FM Mutually Exclusive Applications Filed In Window IV, Public Notice, DA 03-3009, rel. October 1, 2003 (opening a settlement window to facilitate the resolution of more than 140 groups of mutually exclusive applications in one of the five first LPFM filing windows).

The Commission's apparent interest in promoting "economies of scale" also seems misplaced given the highly localized nature of the LPFM service. Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6773. If an entity is interested in reaching larger audiences on a regional or national scale, it may do so by acquiring full power stations or producing and distributing programming to such stations; is not limited to the LPFM service.

<sup>17</sup> See, e.g., Federal Communications Commission, Mass Media Bureau, Policy and Rules Division, Review of the Radio Industry, 2001, at 3 (Sept. 2001) ("The decline in the number of owners reflects a general continuation of the consolidation of the commercial radio industry that has occurred since the passage of the Telecom Act in 1996.").

preserve the inherent localism and diversity of the public radio system. We fear that, absent such forces or strict local and multiple ownership requirements, the LPFM service will no longer serve the purposes the Commission originally envisioned it to serve. Accordingly, we support restoring the original local and multiple ownership restrictions.

## **II. The Commission Should Not Reclassify, And Thereby Subvert, The Entire Translator Service In the Interest of Addressing Possible Abuse During the 2003 Translator Filing Window**

With a stated desire to rectify perceived abuse during a translator application filing window in 2003, the Second Reconsideration Order/Further Notice inquires about such measures as summarily dismissing all pending applications filed during that window and elevating LPFM stations to primary status relative to translator stations.<sup>18</sup> Such measures are deeply troubling for a number of reasons. First and foremost, translator stations are a critical component of the public radio infrastructure, providing important local, state, and regional services to millions of rural and other unserved and underserved listeners. Second, the Commission only recently struck the current balance between translator and LPFM stations after thoroughly exploring the issue, and nothing has changed -- including the 2003 translator filing window -- to justify altering that balance. Finally, and to the extent a few speculators sought to profit by filing excessive numbers of translator applications in the 2003 filing window, the appropriate response is to apply the Commission's existing rules to address the matter and to adopt rules specifically directed to deterring speculation. It is not, we submit, to adopt extreme measures, such as summarily dismissing all pending translator applications or permitting LPFM stations to displace translator stations.

When the Commission initiated the FM translator service in 1970, the Commission

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<sup>18</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6777-78.

recognized its benefits in providing FM radio service to underserved areas, extending additional FM service to underserved areas, and improving service to areas within the predicted 1 mV/m contours of primary FM stations.<sup>19</sup> As NPR demonstrated in its comments in the pending broadcast localism proceeding, the translator service has long served as an important means for public radio stations to extend their services to neighboring communities.<sup>20</sup> Indeed, public radio licensees in many rural areas have established extensive "daisy chain" networks to extend service in an economical fashion.

Substantial Federal funding, principally through the National Telecommunications Information Administration ("NTIA") of the Department of Commerce and its Public Telecommunications Facilities Program ("PTFP"), has long been instrumental in constructing public radio translator stations. In our comments in the broadcast localism proceeding, we offered the following recent examples:

- In the recently announced grants for Fiscal Year 2004, North Country Public Radio received a PTFP grant of \$142,992 (towards a total project cost of \$193,232) to activate 10 translators and an STL to connect them to extend its service in the Adirondack area of upstate New York. The new translators will provide first service to approximately 47,000 people and additional service to more than 58,000 people.
- Also in the FY 2004 grant round, NTIA provided Washington State University, licensee of KRFA-FM, Pulliam, WA with a grant of \$32,212 (towards a total project cost of \$42,950) to activate a translator in Forks, Washington, which will provide first public radio service to approximately 11,127 people.
- In FY 2002, the University of Utah, licensee of KUER, Salt Lake City, UT, received a grant of \$23,676 (toward a total project cost of \$47,535) to improve a microwave and fiber distribution system to serve translators and to replace 6

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<sup>19</sup> See Report and Order in Docket No. 17159, 20 RR 2d 1538 (1970).

<sup>20</sup> Comments of National Public Radio, Inc., MM Docket No. 04-233, at 25-28 (filed Nov. 1, 2004) [hereinafter "NPR Broadcast Localism Comments"].

translators. KUER serves Utah through its main transmitter and a statewide network of 35 translators.

- In FY 2000, NTIA awarded Florida State University, licensee of WFSU-FM, Tallahassee, FL a grant of \$12,999 (towards a total project cost of \$17,332) to construct a translator in Port St. Joe to provide first public radio service to approximately 5,000 people in Gulf County, Florida.<sup>21</sup>

Attached to those comments, and attached hereto for the Commission's convenience, is a list of PTFP grants made for the construction of translator stations and related facilities during the period 1992-2004.<sup>22</sup> Since NTIA only provides a portion of the total cost of constructing a translator station, a public radio station must be able to justify its matching cost based on demand for its public radio service.

Indeed, whether a translator is federally-funded or not, support for its construction almost always derives from the community itself. As but one recent example, a community in Montana is currently attempting to raise \$5,000 of the \$10,000 cost to extend Yellowstone Public Radio from Billings to Wolf Point, Montana.<sup>23</sup> In NPR's broadcast localism comments, we also cited a community group that raised \$13,000 to fund a translator being constructed by Washington State University in Forks, Washington.<sup>24</sup>

Even when a translator is used to reach a community some distance from the station's community of license, public radio stations localize their services by ascertaining and addressing issues of particular interest to the community served by the translator station. Public radio

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<sup>21</sup> NPR Broadcast Localism Comments at 26-27.

<sup>22</sup> Information regarding these and other NTIA PTFP grant awards is available at [www.ntia.doc.gov/ptfp/awards/award.htm](http://www.ntia.doc.gov/ptfp/awards/award.htm).

<sup>23</sup> Across the Big Sky, Great Falls Tribune, Nov. 17, 2004, reprinted at <http://www.greatfallstribune.com/apps/pbcs.dll/article?AID=2004411170313>.

<sup>24</sup> NPR Broadcast Localism Comments at 27.

licensees provide feature material, traffic and weather reports, community calendar reports, and public service announcements relevant to the community. For instance, WFIU-FM, Bloomington, Indiana, a news and classical music station serving the Columbus, Kokomo, and Terre Haute, Indiana areas via translators, often features local cultural events and artists from those communities.<sup>25</sup> Translator stations also provide the only public radio service in many communities. For instance, KUSP-FM, Santa Cruz, California, serves the Monterey County coastal communities via a translator station with the only local radio service, providing an essential service during fires, winter storms and other emergency conditions.<sup>26</sup>

A decision to downgrade translators relative to LPFM stations therefore poses a particularly grave threat to the services public radio stations provide in many rural areas across the country. It is not merely a matter of substituting one (favored) LPFM station for one (disfavored) translator station. Because many public radio station licensees, including statewide public radio networks, utilize "daisy chains" of translator stations to extend service economically over wide geographic areas, the displacement of a single translator could eliminate the service provided by a number of translators beyond that point.<sup>27</sup> Even if one could rightfully claim that an LPFM service is always preferable to a translator service serving the same area, the service provided by one new LPFM station cannot justify displacing translator service in that

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<sup>25</sup> NPR Broadcast Localism Comments at 28.

<sup>26</sup> See, e.g., NPR Broadcast Localism Comments at 28.

<sup>27</sup> The Commission previously recognized this problem when it revised the original LPFM rules to protect the inputs of translator stations. LPFM Memorandum Opinion and Order, 15 FCC Rcd. at 19224 ("[W]e concur with the petitioners that protecting the input signals of FM translator stations is an important component of our overall policy goal of developing LPFM technical rules that protect existing FM translator service.")

community and numerous communities elsewhere. Moreover, even though translator stations are secondary to full power stations and are, therefore, already subject to displacement, translator stations typically serve sparsely populated areas unable to sustain a full power station. Since the LPFM service was established as a low-cost means of serving small communities,<sup>28</sup> translator stations are far more likely to be displaced by LPFM stations.

Given these potentially devastating consequences, one would expect, and the public interest demands, a compelling justification. Yet, the Second Reconsideration Order/Further Notice offers little to justify revisiting the carefully struck balance between LPFM and translator stations, let alone such extreme measures as downgrading the entire translator service.

In finalizing the current LPFM rules, the Commission recognized the difficulty of balancing the spectrum needs of two competing, but functionally different services.<sup>29</sup> The net result was to place LPFM and translator stations on "essentially equal footing in providing reciprocal interference protection,"<sup>30</sup> while requiring translator stations to provide more stringent interference protection to full power stations.<sup>31</sup> This resolution followed a thorough examination of the merits<sup>32</sup> and was generally viewed as a "reasonable balance," including by the principal

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<sup>28</sup> See In the Matter of Creation of Low Power Radio Service, Notice of Proposed Rulemaking, 14 FCC Rcd. 2471, 2471 (1999) ("We believe that these new LPFM stations would provide a low-cost means of serving urban communities and neighborhoods, as well as populations living in smaller rural towns and communities.")

<sup>29</sup> In the Matter of Creation of Low Power Radio Service, Memorandum Opinion and Order, 15 FCC Rcd 19,208 (2000) [hereinafter "LPFM Memorandum Opinion and Order"].

<sup>30</sup> Id. at 19,223.

<sup>31</sup> Id. at 19,220-21.

<sup>32</sup> See In the Matter of Creation of Low Power Radio Service, Report and Order, 15 FCC Rcd 2205, 2229-34 (2000) (addressing the LPFM spectrum rights and responsibilities and minimum distance separation requirements, including *vis-a-vis* FM translator stations). See also

coalition of LPFM proponents.<sup>33</sup>

In reopening the issue, the Commission points to a single event -- the 2003 filing window for translator applications and the significant number of applications it attracted.<sup>34</sup> We believe the Commission's concern is misplaced. While that filing window elicited a significant number of applications, the Commission had barred the filing of new translator station applications since 1997.<sup>35</sup> That there was a significant pent-up demand for translator station permits should not have been a surprise.

Moreover, the Commission itself disputes the preclusive effect of granting the permits sought in the 2003 filing window, noting that "[b]ecause LPFM and FM translator stations are licensed under fundamentally different technical rules, it is impossible to determine the precise extent to which the 2003 window-filed FM translator applications have impacted the potential licensing of new LPFM stations."<sup>36</sup> The Commission rightly rejects the claim that the 2003 translator filing window "opened in major cities before a full LPFM filing window opened,

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LPFM Memorandum Opinion and Order, 15 FCC Rcd at 19,223-24.

<sup>33</sup> United Church of Christ, Office of Communication, Inc.; National Council of the Churches of Christ in the USA, Communication Commission; General Board of Global Ministries of The United Methodist Church; Department for Communication of the Evangelical Lutheran Church in America; Civil Rights Forum; Libraries for the Future; and Consumers Union, Opposition and Response to Petitions for Reconsideration, MM Docket No. 99-25, at 4-5, filed Apr. 24, 2000. See also LPFM Memorandum Opinion and Order, 15 FCC Rcd. at 19,208 (Separate Statement of Commissioner Susan Ness).

<sup>34</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6777.

<sup>35</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Fixed Service Licenses, Notice of Proposed Rulemaking, 12 FCC Rcd. 22363, 22409 (1997) (establishing a freeze on the filing of applications for construction permits for new stations and for major changes to existing facilities in all commercial broadcast services).

<sup>36</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6777.

thereby eliminating virtually all opportunities for new LPFM stations in top-25 markets."<sup>37</sup>

Finally, even though approximately 8,000 of the more than 13,000 remain unprocessed, the Commission blanketly endorses the claim that "many of the translator applications were filed by a relatively small number of non-local filers without any apparent connection to the communities specified in the applications."<sup>38</sup>

Even assuming the number and circumstances surrounding the applications filed during the 2003 translator filing window are causes for legitimate concern, there is no rational connection between those events and proposals to dismiss all pending translator applications submitted during that window, let alone downgrading the entire translator service. When the Commission adopted the rules for resolving mutually exclusive noncommercial educational ("NCE") applications,<sup>39</sup> it "especially asked for suggestions on how to prevent speculation and abuse in NCE licensing."<sup>40</sup> The Commission subsequently concluded that the NCE point system criteria, combined with window filing procedures, "should be sufficient to ameliorate the filing of large numbers of mutually exclusive applications by speculative, barely qualified,

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<sup>37</sup> See Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6777 n.125 ("[W]e reject Prometheus's characterization of the timing of these windows.")

<sup>38</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6777.

<sup>39</sup> While the filing window involved spectrum not reserved for noncommercial educational use, Public Notice, FM Translator Auction Filing Window and Application Freeze, DA 03-359, at 1 (Feb. 6, 2003), mutually exclusive applications among competing NCE applicants are subject to resolution through the NCE point system. In the Matter of Reexamination of the Comparative Standard for Noncommercial Educational Applicants; Association of America's Public Television Stations' Motion for Stay of Low Power Television Auction (No. 81), 18 FCC Rcd. 6691, at 6700 (2003).

<sup>40</sup> In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report and Order, 15 FCC Rcd. 7386, at 7420 (2000) [hereinafter "Comparative Standards Report and Order"].



applicants."<sup>41</sup> The Commission specifically rejected limiting the number of applications that an entity could file in any given filing window, although it reserved the right to impose such a limit via public notice if future circumstances warranted.

To the extent there were a number of speculative applications filed during the 2003 filing window, there are two logical responses. First, the Commission could, as it previously stated, impose an application filing limit as well as other prospective measures specifically designed to deter speculation and abuse. Second, of more immediate importance, the Commission possesses ample authority to investigate applications filed during the 2003 window and reject those found to have been fraudulently filed or otherwise defective. As the Commission's application filing requirements make clear, "[a]ll applicants for new broadcast facilities must have reasonable assurance of committed financing sufficient to construct the proposed facility and operate it for three months without revenue **at the time they file the FCC Form 349**."<sup>42</sup> In addition, "[a]ll applicants for broadcast facilities must have a reasonable assurance that the specified [transmitter] site will be available **at the time they file FCC Form 349**."<sup>43</sup> If a small number of entities submitted substantial numbers of applications, as the Second Reconsideration Order/Further Notice avers,<sup>44</sup> it should not be a difficult task for the Commission to examine the

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<sup>41</sup> Comparative Standards Report and Order, 15 FCC Rcd. at 7422.

<sup>42</sup> FCC Form 349 Instructions at 2 (2001) (citing Liberty Productions, 7 FCC Rcd. 7581, 7584 (1992); Merrimack Valley Broadcasting, Inc., 82 FCC 2d 166, 167 (1980)).

<sup>43</sup> Id. (citing William F. and Anne K. Wallace, 49 FCC 2d 1424, 1427 (Rev. Bd. 1989); Genesee Communications, Inc., 3 FCC Rcd. 3595 (1988); National Innovative Programming Network, 2 FCC Rcd 5641 (1987)).

<sup>44</sup> See Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6777 (crediting Prometheus's claim that "many of the translator applications were filed by a relatively small number of . . . filers").

qualifications of those applicants. Indeed, several groups have already started the process, presenting possible evidence of abuse to the Commission.<sup>45</sup>

What makes little sense, however, is to reject every application filed during the filing window based on a suspicion that some applications may have been improperly submitted. It makes even less sense to reclassify an entire broadcast service, including stations that have been providing highly valued service for many years, based on such suspicion. Yet, that is exactly what the Second Reconsideration Order/Further Notice contemplates.<sup>46</sup> While no individual or entity has a right to broadcast,<sup>47</sup> the Administrative Procedures Act requires Federal agencies to engage in rational rulemaking.<sup>48</sup> We submit that summarily dismissing all pending translator applications and subjecting to displacement all current and future translators based on a suspicion that some speculative applications were filed in a recent filing window is the very essence of arbitrary and capricious rulemaking. Accordingly, while we encourage the Commission to investigate the potentially fraudulent or otherwise improper applications in due

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<sup>45</sup> See Emergency Petition for Freeze on Pending FM Translator Applications of Prometheus Radio Project, REC Networks, Office of Communication of the United Church of Christ, Inc. national Federation of Community Broadcasters, Future of Music, Free Press, Center on Democratic Communications of the National Lawyers Guild, and New America Foundation MM Docket No. 99-25, filed Mar. 9, 2005.

<sup>46</sup> See Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6778 ("Should all LPFM applications have primary status because LPFM stations are permitted to originate local programming?").

<sup>47</sup> National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943). See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.")

<sup>48</sup> See 5 U.S.C. § 706(2)(A) ("The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

course, we urge the Commission to retain its current rules as they concern translator stations.

### **III. The Commission's Proposal to Eliminate the Second and Third Adjacency Protections for Full Power Stations is Expressly Foreclosed by Statute and Contrary to Sound Spectrum Management**

In seeking to authorize new LPFM stations, the Commission inquires about amending Section 73.809 of the Commission's rules to eliminate the second and third adjacency protections for subsequently authorized full power stations.<sup>49</sup> The matter is significant, converting the LPFM service from a secondary service to a co-primary one with respect to new second- and third- adjacent full power stations. While claiming a great imperative to loosen existing interference protections to encourage greater numbers of LPFM stations, the Second Reconsideration Order/Further Notice acknowledges that the existing protection only applies to the 70 dBu core of the full power station's service area,<sup>50</sup> thereby limiting the impact of these so-called "encroaching" full power stations. In addition, the Second Reconsideration Order/Further Notice concedes that to date, only one LPFM station has been forced to cease operations because it could not ameliorate the interference.<sup>51</sup> For these and other reasons, we believe eliminating the existing second- and third-adjacent protection for new full power stations is both beyond the Commission's statutory authority and contrary to sound spectrum management.

The last question the Second Reconsideration Order/Further Notice poses on this matter is, in fact, the first to consider: "Would an amendment to Section 73.809 be consistent with Congress's directive barring the reduction of third-adjacent channel distance separations for 'low

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<sup>49</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6781.

<sup>50</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6780(citing 47 C.F.R. § 73.809(a)(1)).

<sup>51</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6780.

-power FM radio stations?"<sup>52</sup> That, in turn, raises the question whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . ."<sup>53</sup>

Examining the statute at issue here, it does more than "bar[] the reduction of the third adjacent channel distance separations"; it requires the Commission to maintain "the minimum distance separations for third adjacent channels (**as well as** for co-channels and first and second-adjacent channels)" in effect prior to the promulgation of the LPFM rules.<sup>54</sup> While the Second Reconsideration Order/Further Notice seems to suggest a distinction between then-existing co-, first, second, and third-adjacent stations and future ones,<sup>55</sup> the plain language is categorical: the Commission "shall modify the [LPFM] rules" to prescribe minimum distance separations for co-, first, second, and third adjacent full power stations.<sup>56</sup>

In answering the question of statutory intent, moreover, "the customary statutory interpretation tools of 'text, structure, purpose, and legislative history' [are used] to determine

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<sup>52</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6781.

<sup>53</sup> Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) [hereinafter "Chevron"].

<sup>54</sup> The Making Appropriations for the Government of the District of Columbia for FY2001 Act ("2001 D.C. Appropriations Act"), Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762-A-111 (2000) (emphasis added). See also H.R. Rep. No. 567, 106th Cong., 2d Sess. 4 (2000) ("The bill, therefore, requires the FCC to revise its LPFM rules to maintain preexisting levels of interference protection.") [hereinafter "House Report"].

<sup>55</sup> Second Reconsideration Order/Further Notice at 39 (noting, obtusely, that [i]t is always the case that an 'encroachment' issue involves the licensing of a subsequently filed full service station application.

<sup>56</sup> 2001 D.C. Appropriations Act, § 632(a)(1)(A).

whether the Congress has spoken directly "to the precise question at issue."<sup>57</sup> In this case, the relevant legislative history expressly addresses the issue of subsequently authorized full power stations:

Section 2(a)(1) of the bill directs the FCC to modify its rules authorizing LPFM service to provide for minimum separations between LPFM stations and other stations operating on the same channel, or the first, second, or third adjacent channel from the LPFM station. The Commission is directed to maintain the same level of protection from interference from other stations for existing stations **and any new full-power stations** as the Commission's rules provided for such full power stations on January 1, 2000, as provided in section [sic] 73 of the Commission's rules (47 C.F.R. 73). **The Committee intends that this level of protection should apply at any time during the operation of an LPFM station. Thus, LPFM stations which are authorized under this section, but cause interference to new or modified facilities of a full-power station, would be required to modify their facilities or cease operations.**<sup>58</sup>

Simply put, Congress anticipated and flatly rejected any attempted distinction between preexisting and so-called "encroaching" full powered stations. Under well settled principles of administrative law, therefore, since "Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>59</sup>

Even if the issue were open to reasonable dispute, the Commission has not offered any engineering data or analysis to justify eliminating the second and third adjacent protection. Without citing any recent testing or data, the Second Reconsideration Order/Further Notice claims that "the predicted interference area to the full service station would be limited to a small

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<sup>57</sup> Cal. Metro Mobile Communs., Inc. v. FCC, 365 F.3d 38, 44-45 (D.C. Cir. 2004). See also Chevron, 467 U.S. at 843 n.9.

<sup>58</sup> House Report at 7-8.

<sup>59</sup> NPR v. FCC, 254 F.3d 226, 228 (D.C. Cir. 2001) (citing Chevron, 467 U.S. at 842-43).

area in the immediate vicinity of the LPFM station transmitter site."<sup>60</sup> To the extent the Commission believes the Mitre study established that third-adjacent channel protections were not necessary,<sup>61</sup> it has never addressed the study's numerous methodological and other flaws that were catalogued by NPR and others.<sup>62</sup> While Congress can determine for itself whether to credit the Mitre study notwithstanding its abundant flaws, a Commission decision to eliminate existing interference protections based on an uncritical acceptance of the Mitre study's conclusions is unlikely to withstand judicial scrutiny.<sup>63</sup>

Even assuming the interference were limited to a small area in the immediate vicinity of an LPFM transmitter, moreover, the failure to account for the cumulative impact of multiple LPFM station transmitters operating within a full power station's principal service area means there is no way to meaningfully compare the public service offered by a newly enfranchised co-primary LPFM service and future full power stations. Will a multitude of LPFM stations, providing both localized service and localized interference, better serve the public interest than fewer, more spectrum efficient full power stations? One can speculate, but the Second

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<sup>60</sup> Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6780.

<sup>61</sup> See Second Reconsideration Order/Further Notice, 20 FCC Rcd. at 6793 (Statement of Commissioner Adelstein). Of course, the Mitre study did not examine, and therefore cannot be the basis for a regulatory change regarding, second-adjacent channel interference.

<sup>62</sup> See Comments of National Public Radio, Inc., In the Matter of The Mitre Corporation's Technical Report, "Experimental Measurements of the Third-Adjacent-Channel Impacts of Low-Power FM Stations", MM Docket No. 99-25, filed Oct. 14, 2003. Compare Federal Communications Commission, Report to the Congress on the Low Power FM Interference Testing Program at 3-4 (Feb. 19, 2004) (characterizing the comments filed by reference to whether they supported or opposed the Mitre recommendations and making recommendations to Congress based on the Mitre study's conclusions without addressing any of the study's methodological flaws).

<sup>63</sup> See 5 U.S.C. § 706(2)(A).

Reconsideration Order/Further Notice provides no basis on which to make a decision.

Finally, the Commission does not address the relative spectrum inefficiency of LPFM stations compared to full power stations. When the Commission established the LPFM service on a secondary basis to full power stations, it simply ignored the issue because interfering LPFM stations would have to give way to more spectrum efficient full power stations.<sup>64</sup> The Commission has made no attempt to rationalize the spectrum inefficiency of allowing LPFM stations to cause potentially significant harmful interference to future, otherwise more spectrum efficient full power stations.

In sum, even if the Commission enjoyed the statutory authority to diminish or remove interference protections between LPFM and full power stations, the Commission has not performed the necessary engineering and public policy analysis to justify changing those protections. Accordingly, the only appropriate response to the Commission's suggested elimination of second and third adjacency protection for future full power stations is to maintain the status quo.

### **Conclusion**

In the interest of encouraging NCE services from full power, translator, and LPFM stations that serve the public interest, convenience, and necessity, NPR urges the Commission to modify its LPFM rules in accordance with the comments set forth above.

Respectfully Submitted,

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<sup>64</sup> LPFM Report and Order, 15 FCC Rcd at 2321 (dissenting statement of Commissioner Furchtgott-Roth) ("Notably, the rationale for the 100-watt minimum was efficiency in spectrum distribution. It was thought inefficient, unwise, and unmanageable to license radio stations at operating powers any less than this. Today's Order never comes to terms with the Commission's clear statements about the need for the 100-watt floor.") (citation omitted).

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